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Reply to “How Foot Voting Enhances Political Freedom”

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Reply to “How Foot Voting Enhances Political Freedom”

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TABLE OF CONTENTS

I.	INTRODUCTION	1121
II.	THE ECONOMIC UNDERPINNINGS ARE OVERSOLD	1122
III.	THE RELEVANCE OF FACTUAL IGNORANCE IN UNDERMINING THE CASE FOR DEMOCRACY IS OVERPLAYED	1125
IV.	THE PHILOSOPHICAL CASE IS PROBLEMATIC	1126

I. INTRODUCTION

My job is to comment briefly on Ilya Somin’s Article, *How Foot Voting Enhances Political Freedom*. Of necessity, then, I will be selective. The thrust of the Article—which appears to be an excerpt from an upcoming book—is that “ballot box voting” compares unfavorably to “foot voting.”¹ The terms are Somin’s, not mine. The former phrase refers to what we would normally just call “voting.” The latter refers to what would normally fall under the aegis of migration, immigration, emigration, or even moving to another jurisdiction. And when we compare those two alternatives—voting in a democratic election and picking up one’s life to move to another jurisdiction, be it another state in a federal jurisdiction or be it another country—the Somin line is that the latter, foot voting, is more valuable.²

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1. Ilya Somin, *How Foot Voting Enhances Political Freedom*, 56 SAN DIEGO L. REV. 1089, 1092 (2019).

2. *Id.*

It does more to allow individuals to express their political choices; it does more to enable individuals to improve their lot in life; it involves much more in the way of making decisions that really matter; it is considerably more efficacious in advancing political freedom and allowing individuals' choice to be decisive; it is in many ways, and to a great extent, the superior alternative.

Or so says Somin. In part, this evaluation of his flows from taking a very bleak view of the comparative worth of democratic participation—ballot box voting, as he puts it.³ I know that throughout the Article there are times when he will say things such as that “[t]he ballot box indeed has great value,”⁴ that ballot box voting has some genuine virtues,⁵ that “[d]emocracy is superior to dictatorship in many ways,”⁶ and the like. However, nowhere in this Article does Somin ever really tell us what that value of democratic decision-making actually is beyond a vague genuflection in the direction of precluding famines and punishing leaders after wars. And as a reviewer of Somin’s earlier book,⁷ I do not recall any real account of the virtues of democracy there, either. Still, there is this concession that democratic voting has *some* value; its worth is just quite enervated compared to a more or less wide-open scope to get up and move where one wants—foot voting. That is the gist of this Somin Article—and book—leaving aside a good deal of interesting and nuanced argument.

Still, it did not convince me. And to give you a taste of why that is I am going to set out three broad lines of argument that might make us have some doubts about the Somin position, or at least cause us to question the extent to which walking beats ticking a ballot paper.

II. THE ECONOMIC UNDERPINNINGS ARE OVERSOLD

The core of the Somin case is premised on a claim that a more or less wide-open scope for people to move across national boundaries, but of course also within nation states, will deliver not just big, but indeed huge, economic gains. So, Somin explicitly says that “[e]conomists estimate that allowing free migration throughout the world would likely double world GDP.”⁸

3. See *id.* at 1090.

4. *Id.*

5. See *id.* at 1104.

6. *Id.* at 1107.

7. See generally James Allan, *Do Judges Know Best?*, 32 CONST. COMMENT. 479 (2017) (reviewing ILYA SOMIN, *DEMOCRACY AND POLITICAL IGNORANCE: WHY SMALLER GOVERNMENT IS SMARTER* (2d ed. 2016)).

8. Somin, *supra* note 1, at 1104 (citing Michael A. Clemens, *Economics and Emigration: Trillion-Dollar Bills on the Sidewalk?*, 25 J. ECON. PERSP. 83, 84 (2011)). The citation

Now, I have to confess that I am the black sheep in my family, having opted to be a lawyer. You see I come from a family of economists, my dad, my uncle, and my sister, they are all economists. I am used to arguing with and against them, and I admit that Somin's claim that the world could double Gross Domestic Product (GDP) struck me as fanciful.⁹ As chance would have it in March 2019, I was in Budapest at a big conference on immigration, and I ended up chatting with a Harvard economist who specializes in immigration economics—one George Borjas. So, when I was asked to comment on this Somin Article I emailed Borjas and asked him what he made of the Somin-Clemens claim. It turns out that Professor Borjas has written a number of articles taking issue with this claim, which in the literature is often referred to as leaving “a trillion-dollar bills’ lying on the sidewalk.”¹⁰ Borjas's replies or rebuttals include a 2015 Article in the *Journal of Economic Literature*.¹¹ But the gist of that line of rebuttal—in Borjas's words in an email to me—is “that to achieve those kinds of gains you'd need to move a bit over 6 billion people to the richer countries.”¹² And even that would not do it unless there exist “no externalities of any kind”¹³—meaning each and every one of the costs that would come with these gains from virtually unconstrained migration. It rests on a “if only countries would stop being countries” premise, Borjas says, and would effect a “substantial [perhaps massive] redistribution of wealth.”¹⁴ At one point in his reply, Borjas repeats what the senior partner of the big Toronto law firm I once worked at told me on my first day there: “Things that sound too good to be true, however, usually are.”¹⁵

Others, including Amy Wax in a recent Article, have pointed out that the gains and losses from this are not evenly distributed.¹⁶ Working class

Somin uses, an Article by Michael Clemens in the *Journal of Economic Perspectives*, is the same basic claim also made by Somin—while later Somin talks of its “massive advantages.” *Id.* at 1091, 1104 n.68, 1105.

9. *See id.* at 1091, 1104.

10. George J. Borjas, *Immigration and Globalization: A Review Essay*, 53 J. ECON. LITERATURE 961, 962 (2015).

11. *See generally id.*

12. E-mail from George J. Borjas, Professor of Econ. & Soc. Policy, Harvard Kennedy Sch., to James Allan, Garrick Professor of Law, TC Beirne Sch. of Law, University of Queensland (Apr. 27, 2019, 12:26 AM) (on file with author).

13. *Id.*

14. Borjas, *supra* note 10, at 966.

15. *Id.* at 967.

16. *See* Amy L. Wax, *Debating Immigration Restriction: The Case for Low and Slow*, 16 GEO. J.L. & PUB. POL'Y 837, 848 (2018).

people would be the biggest losers.¹⁷ Davos Man type financier capitalists would be the biggest winners.¹⁸ Indeed even today in the United States, the workforce participation rate for working class men is at its lowest level since the Great Depression.¹⁹ There are good grounds for doubting that the native workforce participation rate would go up under the Somin scenario, indeed extremely good grounds. And so, one further cost is quite likely to be a revolt of the “deplorables.”²⁰

And as for how a single country would fare, let me just say that my home country of Australia has the OECD record for longest time without a recession—some twenty-seven years.²¹ Its GDP keeps going up.²² It also runs the world’s highest per capita immigration intake.²³ And since GDP just measures economic activity, if you let in a ton of people it is almost a sure thing that a country’s year-on-year GDP will go up, as it has in Australia. But over those last twenty-seven years, if you compare Australia’s per capita GDP increase, which is how individual people are faring, to Japan’s—remembering that Japan has virtually zero immigration into the country²⁴—it turns out they are about the same. Growth per person in Japan equals what it has been in Australia over that time that there have been no recessions Down Under.²⁵ It equals it without all—indeed, without any—of the costs associated with big immigration on infrastructure, on some forms of welfare provision, on the need for language training, on schools, and the like. My point is that all of this implies that virtually all the gains of Sominian foot voting go to those coming into a country.

17. *See id.*

18. *Id.*

19. *Id.* at 850.

20. *Id.* at 843. The term was perhaps most famously invoked, in a derogatory sense, by Hillary Clinton. *See Clinton: Half of Trump Supporters ‘Basket of Depolorables,’* BBC (Sept. 10, 2016), <https://www.bbc.com/news/av/election-us-2016-37329812/clinton-half-of-trump-supporters-basket-of-deplorables> [<https://perma.cc/R6DE-4Z8K>].

21. *See Australia Holds World Record for Longest Period of Growth Among Developed Economies*, AUSTRAL. TRADE & INV. COMMISSION (Nov. 28, 2018), <https://www.austrade.gov.au/international/invest/investor-updates/2018/australia-holds-world-record-for-longest-period-of-growth-among-developed-economies> [<https://perma.cc/4M4M-U2MN>].

22. *Id.*

23. *See International Migrant Stock 2017: Graphs*, UNITED NATIONS DEP’T ECON. & SOC. AFF., <https://www.un.org/en/development/desa/population/migration/data/estimates2/estimatesgraphs.asp?lg1> [<https://perma.cc/UV42-CXGJ>].

24. *See* David Green, *As Its Population Ages, Japan Quietly Turns to Immigration*, MIGRATION POL’Y INST. (Mar. 28, 2017), <https://www.migrationpolicy.org/article/its-population-ages-japan-quietly-turns-immigration> [<https://perma.cc/QB3Q-5UC8>].

25. *See* World Bank Grp., *GDP Per Capita Growth (Annual %)*, WORLD BANK, <https://data.worldbank.org/indicator/NY.GDP.PCAP.KD.ZG?end=2018&locations=JP-AU&start=1991> [<https://perma.cc/UF6K-E6JB>].

At any rate, here I simply want to note that I have some pretty big doubts about the core economic underpinnings of Somin's argument about the virtues of unconstrained foot voting. And as I said, that is without getting into the costs, which in big ticket terms might be classified into queries about: (1) how this sort of mass immigration could coexist with the welfare state; (2) whether some cultures work less well in a modern democratic state—for instance, ones that makes blasphemy a capital offense and so allow those with power an indirect route to silence dissent; (3) assuming you could keep a welfare state functioning, what these sort of incentives would do to the native citizen population; (4) who would pay for the needed infrastructure upgrades; (5) the negative features of any political setup that had the raw power to impose this on the native population; and the list goes on.

III. THE RELEVANCE OF FACTUAL IGNORANCE IN UNDERMINING THE CASE FOR DEMOCRACY IS OVERPLAYED

As I detail this in my Article in this symposium issue, as well as in my *Constitutional Commentary* review of Somin's earlier book,²⁶ I will not repeat myself here save to note that I believe the "voters are ignorant"²⁷ theme in the Somin Article is made to do too much work. You do not have to have at ready recall the minutiae of all the facts in play to make a call on important matters. Often, it is one's underlying sentiments—say, to favor voting over immediate economic prospects—that matter, as with the United Kingdom's Brexit vote.²⁸ Or whether to favor criminal procedure protections over support for accusers regarding sexual harassment claims on university campuses. Or indeed as regards what stance to take on the issue of large-scale immigration into one's country when that is itself a key election issue. My point is that Somin strikes me as having a very desiccated view of what motivates people to vote and how those motivations rely on, and need to rely on, a comprehensive grasp of factual backgrounds.

And if, as Somin repeatedly reminds us, the test is the "odds of determining the result"²⁹ or one's determinative influence on it, then: Why not votes

26. See generally Allan, *supra* note 7.

27. See Somin, *supra* note 1, at 1116.

28. See James Allan, *Democracy, Liberalism, and Brexit*, 39 CARDOZO L. REV. 879, 884 (2018) (arguing that Brexit was the people's choice to be more democratic regardless of short term economic loss).

29. See Somin, *supra* note 1, at 1114.

only for men—because women’s individual votes are statistically of near zero determinative effect, so you have not really prejudiced any single, particular woman? Why not two votes for the rich to one for the middle classes and none for the poor—on the same rationale? And if it is about one’s statistical influence to alter the outcome, then it seems to follow that denying women the franchise in the United States is more defensible than it is in New Zealand—because the former’s population is so much greater making the harm orders of magnitude less.

IV. THE PHILOSOPHICAL CASE IS PROBLEMATIC

Lastly, I have space only to raise a few issues that seem to me to put pressure on the philosophical underpinnings of Somin’s case. These include:

From where does Somin’s right to mobility³⁰ come? Is it a pre-civil society natural right—and, hence, open to all the critiques against natural law thinking—or is it a manmade, government imposed entitlement—and, hence, open to challenge by those who would establish different manmade rights? Personally, I am skeptical it exists on either ground, and I certainly reject Somin’s attempt to analogize restricting immigration to supporting slavery.³¹

Somin implicitly adopts the migrant’s vantage rather than the receiving citizen’s.³² I am not at all clear why the former should be afforded *prima facie* priority or preference.

Somin has little good to say about the nation state and is openly disparaging of nationalism.³³ I think that is wrong. Democracy basically cannot function above the level of the nation state—see how poorly the European Union functions and likewise the United Nations’ General Assembly. Nationalism, and the nation state, have created much good to go along with the bad. And one of the implicit themes, it seems to me, that flows from Somin is that governing will at some point have to take place at a supranational level.³⁴ However, I do not see him providing any cost-benefit analysis of that shift ending up in the plus side of the ledger. Worse, on the Somin argument I cannot see how any body or institution could qualify as having legitimate authority over an individual. If there is no legitimacy at the national level, how can there be any at the supranational level?

Not surprisingly, then, Somin makes freedom or autonomy the highest good—this is clear throughout the Article, including his talk of “fully

30. *See id.* at 1103.

31. *See id.* at 1107–08.

32. *See id.* at 1107–09.

33. *See id.* at 1105–06.

34. *See id.* at 1193–94.

consensual.”³⁵ But that is open to serious objection—and to be clear I am not saying freedom is not a good, what I am querying is that it is in any way obviously the highest good, one that always and everywhere trumps all comers. Of course, this making autonomy preeminent is the core libertarian position. I know that. But it is hardly self-evidently persuasive.

If, like me, you are a proponent of World Trade Organization-style free trade in goods, how much further benefit flows economically by adding free movement of people? Does the former do most of the work?

Somin’s understanding of reason and rationality is Kantian rather than Humean. I think he is wrong in favoring the former as the more persuasive,³⁶ but his argument rests on that sort of understanding of rationality.

Somin equates (1) freedom to leave country *X* and (2) freedom to enter country *X*.³⁷ Why? In today’s western democracies, unlike the former Soviet Union, there is a near universal freedom to leave—barring those in prison. Why should entering deserve an exactly equivalent moral treatment? Somin never says.

Here is another quibble. Somin assumes that making it harder to pass a law equates to less domination.³⁸ But there is really no *prima facie* ground for thinking that the status quo is a less bad position—pick your terms of reference—than what a proposed new law would deliver.

Lastly, I am not at all clear what Somin’s end-state utopia would be. In other words, what happens when six or seven or eight billion people have moved around, when all the massive redistribution of wealth has taken place—massively upwards, says Somin, probably downwards, say I—and when you have a steady state economy across the globe. What then? Will there be democracy, still? Does he want there to be? Will it work at the global level?

At any rate, those are just a few of the questions that this nuanced and detailed Article provoked me to raise. So, I finish by thanking Somin for providing the Article to all of us.

35. See *id.* at 1102.

36. See JAMES ALLAN, A SCEPTICAL THEORY OF MORALITY AND LAW 9–10 (1998).

37. Somin, *supra* note 1, at 1103.

38. *Id.* at 1105–06.

